



August 23, 2018

VIA ECFS

Marlene H. Dortch, Esq
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: NCTA June 11, 2018 Letter in Wireline Infrastructure, WC Docket No. 17-84

Dear Ms. Dortch:

The City of Bloomington, Minnesota submits this letter in response to the June 11, 2018 letter of Rick Chessen of NCTA (the "NCTA Letter"). NCTA requests no fewer than twelve rulings from the Commission,¹ all of which inappropriately encroach on local governmental regulation of public rights-of-way and federal law. The Commission should not act on NCTA's request.

The City of Bloomington is located in southern Hennepin County, Minnesota. Bloomington is home to more than 88,000 residents, 90,000 jobs and the Mall of America – a world-renowned retail and tourist destination. Bloomington is a critical business hub in the Twin Cities, with retail and entertainment, hotel and restaurant, health maintenance and computer manufacturing industries all having a presence in the City.

Bloomington has actively promoted broadband deployment by processing several small cell permits, within the rights of way, in the past 12 months. Four permits with seven locations have been issued and are operational or in the process of being installed, with one currently in permit review at this time. Preliminary discussions are taking place with a cell provider about an additional four locations with a formal permit application expected in the coming month. All of these permits were processed ahead of or on time, based on the Minnesota state statute guidelines. No permits for small cell installations within the rights of way have been denied.

Additionally, on nonpublic lands seven applications representing 40 total small cell antenna installations have been deployed in Bloomington since 2016. The application fee for such a review is \$130 and the processing on average takes 5-10 business days.

In 2015, Bloomington also welcomed another cable provider to the community and approved a five-year franchise agreement with CenturyLink to provide residents with more options for cable

¹ See Exhibit A.

television service and to allow a strong platform for CenturyLink to continue to provide its broadband services.

Ultimately, Bloomington has successfully managed its unique local issues in a way that has promoted broadband deployment to benefit our businesses and residents. City Staff work with the wireless carriers to find safe and appropriate locations to deploy new equipment.

NCTA asks the Commission to undermine these successful efforts. According to NCTA, reform is needed to “reduce or eliminate obstacles to broadband deployment.”² It is clear that these obstacles do not exist in Bloomington. And since the cable industry is “a leader in the deployment of broadband infrastructure”³ and has invested over \$275 billion to deploy broadband networks,⁴ it not clear the obstacles exist elsewhere.

NCTA is encouraging the Commission to implement radical changes without the benefit of a full and complete record or an accurate description of the current law. Adopting NCTA’s requests without adequate support would be bad policy and contrary to the law. If the Commission has interest in the issues discussed by NCTA, it should initiate a full and thorough examination. Importantly, that examination will show that NCTA’s requests are inappropriate.

Bloomington has a legitimate and congressionally-recognized interest in regulating public rights-of-way. Those regulatory activities are not a “profit center.”⁵ Rather, it is NCTA that seeks to turn public property into a profit center for private businesses, all to the detriment of the citizens of Bloomington. The Commission should not grant NCTA’s requests.

I. THE NCTA LETTER DOES NOT PROVIDE AN ACCURATE AND COMPLETE UNDERSTANDING OF THE FACTS AND LAW.

NCTA asks the Commission to significantly alter the existing regulatory framework based on vague references to a handful of unidentified local governments.⁶ Bloomington has not assessed NCTA’s claims, but even if true, a few instances across the country do not justify a new regulatory paradigm. NCTA itself acknowledges that “many local governments are supportive of the cable industry’s deployment of new facilities and new services....”⁷ As noted above, Bloomington has actively supported broadband deployment by welcoming additional cable television services to the community with the approval of a five-year franchise agreement with CenturyLink, working with wireless carriers to find safe and appropriate locations to deploy new equipment and by processing permits in a timely manner. Specifically, the City has processed several small cell permits, within the rights-of-way, in the past 12 months, issued four permits with seven locations that are operational or in the process of being installed, with one currently in permit review, and conducted preliminary discussions with a cell provider about an additional four locations with a formal permit application expected in the coming month. Moreover, on nonpublic lands seven applications representing 40 total small cell antenna installations have

² NCTA Letter, p. 1.

³ NCTA Letter, p. 1.

⁴ <https://www.ncta.com/broadband-by-the-numbers>.

⁵ NCTA Letter, p. 9.

⁶ NCTA Letter, p. 1 (emphasis added).

⁷ NCTA Letter, p. 1 (emphasis added).

been deployed in Bloomington since 2016. The application fee for such a review is \$130 and the processing on average takes 5-10 business days.

NCTA's members have invested \$275 billion in the last 20 years under the existing regulatory framework.⁸ Clearly, the isolated actions of a few local governments are not stopping NCTA's members from deploying broadband. If the Commission considers NCTA's requests, it should do so with the benefit of a full, complete and accurate record of existing regulatory policies – both successes and areas that are in need of improvement.

The Commission existing dockets do not provide the evidentiary basis for assessing NCTA's claims. For example, those dockets do not account for the different regulatory regimes for cable operators and telecommunications providers. These differences are codified in federal, state and local laws. Any assessment of NCTA's assertions by the Commission should draw upon the *cable* regulatory regime, which currently provides that governments are not barred from regulating the provision of non-telecommunications services by incumbent cable providers.⁹ The NCTA Letter does not provide adequate basis for departing from the existing law.

II. BLOOMINGTON HAS A LEGITIMATE INTEREST IN REGULATING PUBLIC RIGHTS-OF-WAY.

Bloomington has an obligation to protect public health, safety, and welfare of its citizens. Federal law recognizes regulation of rights-of-way as a component of that obligation.¹⁰ NCTA asks the Commission to radically restrict these federally-guaranteed rights so that Bloomington and other local governments may only regulate the “time, place and manner of access for construction that will disrupt use of the right-of-way.”¹¹ Under NCTA's proposal, Bloomington and other local governments might not be able to require undergrounding, as such regulations are not related to the time, place and manner of access for construction. The inability to regulate how the rights-of-way are used by industry would be a severe and unreasonable restraint on federally-authorized powers.

The severity of NCTA's request is even more problematic given NCTA's claims that cable operators can leverage their cable franchises to provide non-cable services.¹² NCTA asserts that a cable franchise “includes authority to install and operate ... communications equipment to provide additional non-cable services without obtaining a separate franchise or authorization or paying additional fees.”¹³ Taken on its face, NCTA's position means a cable operator would be free to line residential streets with 150 foot monopoles and local governments could only regulate the “time, place and manner” of when these facilities are installed in the public rights-of-way. Such an outcome is clearly at odds with federal law and is poor public policy.

⁸ <https://www.ncta.com/broadband-by-the-numbers>.

⁹ *Montgomery County, Maryland v. Federal Communications Commission*, 863 F.3d 485, 493 (6th Cir. 2017).

¹⁰ 47 U.S.C. §§ 253(c), 556(a).

¹¹ NCTA Letter, p. 9.

¹² NCTA Letter, p. 2-3.

¹³ NCTA Letter, p. 6.

III. INDUSTRY SHOULD COMPENSATE THE CITIZENS FOR USING VALUABLE PUBLIC PROPERTY.

Public rights-of-way belong to the citizens, not private businesses.¹⁴ Bloomington and other local governments cannot “abdicate [their] trust over property in which the whole people are interested . . . so as to leave them entirely under the use and control of private parties....”¹⁵ Yet, that is exactly what NCTA seeks. The Commission should not acquiesce.

Fulfilling the obligation to hold public property in trust requires securing fair and reasonable compensation for the use of public rights-of-way. For cable services, Congress has determined that a franchise fee of up to 5% of gross revenues is fair and reasonable compensation.¹⁶ But Congress has not determined that payment of the 5% cable franchise fee is fair and reasonable compensation for other uses of the public rights-of-way. The public rights-of-way have extraordinary value to cable operators and others. It is inappropriate for that value to be taken from the citizens and transferred to private businesses.

Bloomington also incurs costs associated with its management of the rights-of-way. These management costs are increasing, due in part, to the additional demand for access to public rights-of-way for broadband deployment. Minnesota law provides that Bloomington is to recover its management costs.¹⁷ These costs include receiving, evaluating, and processing registration requests and rights-of-way permits. There are also ongoing costs from monitoring and evaluation to make sure that private parties are not diminishing the public’s use of the rights-of-way or interfering with each other. These are all legitimate costs that should be paid by cost-causers.

IV. CONCLUSION

The NCTA Letter provides an insufficient basis for issuing the rulings requested by NCTA. If the Commission decides to consider NCTA’s requests, the Commission should develop a full, complete and accurate record. Until such a record is developed, NCTA’s requests should not be granted.

Very truly yours,



Janine Hill

Communications Administrator
City of Bloomington, Minnesota

¹⁴ *Illinois Central R. Co. v. Illinois*, 146 U.S. 387, 452 (1892).

¹⁵ *Id.* at 453.

¹⁶ 47 U.S.C. § 542(b).

¹⁷ Minn. Stat. § 237.163, subd. 2 (b) (“Subject to this section, a local government unit has the authority to manage its public rights-of-way and to recover its rights-of-way management costs.”).

CC: Bloomington Mayor Gene Winstead
City Manager Jamie Verbrugge
Public Works Director Karl Keel
Community Services Director Diann Kirby
City Attorney Melissa Manderschied
Brian T. Grogan, Esq., Moss & Barnett

EXHIBIT A**12 Rulings Requested by NCTA**

1. Clarify that local authorities may not require additional franchises, fees, conditions or authorizations beyond a Title VI cable franchise and routine, straightforward permits for the placement of the cable system (and equipment attached thereto) in the public right of way, or for the offering of new services over such facilities.
2. Confirm that authority to build a "cable system," as defined in Section 602 includes authority to install and operate, as part of the cable system, communications equipment to provide additional non-cable services without obtaining a separate franchise or authorization or paying additional fees.
3. State that local authorities may not require cable operators to obtain separate authorization beyond the cable franchise for placement of small wireless equipment on a cable system.
4. Reaffirm that the federal 5% cap on cable service franchise fees for use of the public right of way for the provision of cable and non-cable services.
5. Declare that a franchising authority a franchising authority cannot refuse to process permit requests on the ground that the equipment can be used for non-cable services, including wireless services.
6. Declare a provider may not be required to obtain additional approval or consent from the franchising authority, other than generally applicable traffic control permits, for lashing communications facilities to facilities already installed under a cable franchise.
7. Declare new facilities to be installed as part of a franchised cable system in the public right-of-way may be subject only to generally applicable permit provisions addressing time, place and manner of access for construction that will disrupt use of the right-of-way and should be processed in a timely manner.
8. Declare any fees for routine permits should be limited to the actual cost of processing and reviewing the permit.
9. Adopt a declaratory ruling that, in addition to their rights under state property law, franchised cable operators have the right under Section 621(a)(2) to utilize compatible utility easements, regardless of the services provided over the cable system.
10. Rule that owners of private easements may not engage in discriminatory behavior or restrict a franchised cable operator's rights to utilize compatible easements for such purposes.
11. Cable operators should have access to easements under the terms and conditions of existing easement agreements, without being required to negotiate a new agreement with the grantor of the easement.
12. Find any costs incurred by a cable operator and not reimbursed by a franchising authority in connection with any discriminatory forced relocation of facilities are considered franchise fees for purposes of Title VI.